

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-551

COMMONWEALTH

vs.

EARL L. JOSEPH.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After chasing the defendant through several blocks of the Dorchester section of Boston, the police eventually arrested him and charged him with, among other things, criminal trespass and assault and battery on a police officer. He was found guilty of both charges after a bench trial. On appeal, he challenges the sufficiency of the evidence as to both charges. We affirm the judgment for assault and battery on a police officer, but reverse the judgment for criminal trespass.

Background. We recite the material facts adduced at trial, in the light most favorable to the Commonwealth. Commonwealth v. Javier, 481 Mass. 268, 270 (2019). On May 5, 2017, at approximately 4:00 A.M. Officer Michael Butler of the Boston Police Department was on patrol in his unmarked police cruiser, when he received a radio call to be on the lookout for a black

male riding a dark bicycle, in the area of Cushing Avenue in Dorchester. The subject was suspected of a break-in. Shortly thereafter Butler observed a black male on a dark bicycle, coming down Jerome Street from the direction of Cushing.

At one point the bicycle rider passed within twenty to thirty feet of Butler's cruiser and Butler recognized the rider as the defendant, whom he knew by name. Butler then briefly followed the defendant in his cruiser, with his lights flashing. The defendant turned onto Bird Street, left the roadway, threw down his bicycle, and ran down "an alleyway" between number 8 and number 10 Bird Street.

Butler and his partner left their vehicle and gave chase on foot, passing through an open gate at the beginning of the "alleyway." They reached a "backyard" area, but at that point they had lost sight of the defendant. Butler then radioed for help in apprehending the defendant.

Meanwhile Officer Lawrence Welch was also patrolling the general area, and he heard the call from Officer Butler and began searching on foot around the alleyways located off of Columbia Road. Welch was a few blocks away from Butler; he was in police uniform and by himself. Welch encountered the defendant crouched behind some boxes in a dark alleyway off of Columbia Road. Welch recognized the defendant, whom he knew as the person named in the radio broadcast. Welch ordered the

defendant to show his hands and to turn around, and attempted to handcuff the defendant "for [Welch's] safety."

Rather than submit to the handcuffs, the defendant began to "strike" Welch. He elbowed Welch "in[] the chest," and "push[ed] off." Welch told the defendant to calm down, but the defendant continued to push off, and eventually broke free and ran away.

The defendant's address, however, was known to the police. Both Butler and Welch accordingly caught up with the defendant, and arrested him, approximately one hour later at the defendant's apartment. The defendant was initially charged with twelve offenses, but only three of them went forward to trial -- trespass, assault and battery on a police officer, and malicious damage to a vehicle. Defense counsel moved for a required finding of not guilty on all counts, which was allowed only as to the malicious damage to a vehicle charge. The defendant was convicted of trespass, and assault and battery on a police officer.¹ The defendant timely appealed.

Discussion. The defendant challenges the sufficiency of the evidence as to both charges. Under Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), we examine "whether, after viewing the evidence in the light most favorable to the

¹ The defendant was sentenced to two and one-half years in the house of correction for the assault and battery on a police officer, and to time served on the trespass charge.

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

1. Assault and battery on a police officer. As to the assault and battery on a police officer charge, the defendant argues that there was insufficient evidence that he intended to touch Officer Welch. The defendant claims instead that he was "closed in" by the officer and just trying to "get away" -- there was no intent to touch the officer.

This argument is plainly without merit. The officer was in uniform, badge displayed, and he spoke to the defendant and told him why he was attempting to handcuff him. The officer testified that the defendant then struck, hit, and pushed the officer away, and that as a result the defendant was able to escape the handcuffs. This evidence was more than sufficient to support a finding that the touching was intentional, and to support a conviction for assault and battery on a police officer.

2. Criminal trespass. There was not sufficient evidence, however, to support the conviction of criminal trespass. The operative language of the criminal trespass statute states:

"Whoever, without right enters or remains in or upon the . . . improved or enclosed land . . . of another, . . . after having been forbidden so to do by the person who has lawful control of said premises, whether directly or by notice posted thereon, . . . shall be punished"
G. L. c. 266, § 120.

The Commonwealth's theory at trial was that the defendant violated the statute when he ran "down the alleyway" between 8 and 10 Bird Street, after which the defendant went "into the rear" of the house "on the right." The evidence and the reasonable inferences therefrom, however, failed to show that this amounted to trespass as defined by the statute. Officer Butler testified that there was a sign stating "no trespassing" posted about fifteen feet up on the side of the house on the right, which sign was visible that night from the place that the defendant left his bike and entered the alleyway.² However, there was no evidence as to the ownership of the "alleyway." Butler, the only witness on this issue, described the alleyway as a "shared alleyway" between the two homes. He stated that there was a single gate to the alleyway, and a fence that ran down the middle of the alleyway, splitting it. There was no sign on the gate or along the alleyway. The owner of the property "on the right" did not testify.³ No plan or layout of the property was introduced, nor did Butler testify as to where

² The evidence included a photograph of the sign, taken the evening in question.

³ The evidence was that the property "on the right" was 10 Bird Street.

the defendant traveled in relation to the fence, the alleyway, or any other property landmarks.⁴

This evidence was not sufficient to convict the defendant of criminal trespass.⁵ The statute requires that the defendant, "without right," entered on the land "of another." It also requires that the trespasser be "forbidden" to enter by the person who has lawful control of the premises, either "directly" or by "notice posted thereon." As noted, here the owner of the land at issue did not testify, and there was no evidence identifying the owner. Moreover, there was insufficient proof of where the defendant actually traveled, or that the defendant even was on property from which he could be rightfully excluded.⁶

⁴ Butler did state, without objection, that the fence in the alleyway was "along the property line . . . that separated the two houses." There was no further description, and no foundation provided for Butler's testimony regarding a "property line."

⁵ The defendant's principal contention at trial was that a rational fact finder could not conclude that the sign, fifteen feet off the ground, provided a person running through the area at night sufficient posted "notice" to meet the statutory requirement. We need not reach the issue. Although not raised below, we think the failure of proof here went to different elements -- there was an insufficient showing that the defendant was on the land "of another," "without right." We review the evidence as to those elements under a substantial risk of a miscarriage of justice standard. Commonwealth v. Rodriguez, 58 Mass. App. Ct. 610, 621 (2003).

⁶ The defendant also points out on appeal that there was no evidence that he was not authorized to be on the property. We need not and do not rest our decision on this ground. We note, however, that our courts have not decided whether proof of a

The decision in Commonwealth v. Greene, 461 Mass. 1011, 1012 (2012), is instructive. There the defendant was convicted of criminal trespass for entering onto his mother's property after his mother had moved to a nursing home. The contention was that the mother's temporary guardian had forbidden the defendant to enter the property. The guardian did not testify, however, and the only evidence that the defendant had been forbidden to enter came in as hearsay, without objection, through a police officer. The court held that the evidence was insufficient to show that the defendant had been excluded by a person having lawful control. The court concluded: "[I]t is not enough for the appellate court to find that there was some record evidence, however slight, to support each essential element of the offense; it must find that there was enough evidence that could have satisfied a rational trier of fact of each such element beyond a reasonable doubt." Id., quoting Latimore, 378 Mass. at 677-678.

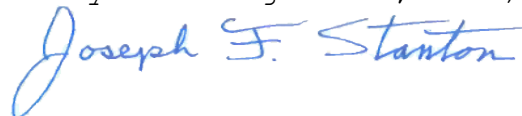
lack of authority is an element of the crime of criminal trespass, or whether authorization is an affirmative defense that the defendant must prove. See generally G. L. c. 278, § 7 ("A defendant in a criminal prosecution, relying for his justification upon a license . . . or authority, shall prove the same"); Commonwealth v. Jefferson, 377 Mass. 716 (1979) (applying G. L. c. 278, § 7, to a charge of unlawful possession of hypodermic needles).

The same is true here. The evidence was insufficient to convict the defendant of trespassing on the land "of another" "without right."

On count twelve of the complaint, charging assault and battery on a police officer, the judgment is affirmed. On count four of the complaint, charging trespass, the judgment is reversed, the finding is set aside, and judgment shall enter for the defendant on that count.

So ordered.

By the Court (Milkey,
Neyman & Englander, JJ.⁷),



Clerk

Entered: August 12, 2019.

⁷ The panelists are listed in order of seniority.